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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1988

—0—

ARTHUR DITMAR

Appellant

vs.

NEEDHAM, HARPER WORLDWIDE, INC.,

ANHEUSER-BUSCH, INC.

Appellees

—0—

APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO

—0—

JURISDICTIONAL STATEMENT

—0—

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DATE: AUGUST 1988

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QUESTION PRESENTED

There is a growing malaise amongst the citizenry that the "courts of the land" are not responsive to the "needs" of the people; i.e., you must be a Firestone or Busch, General Motors or General Electric, or a "Hustler" or the Insurance Industry to be heard by the courts or to be treated fairly by the government , that "form" takes precedence over "Substance", and that the courts of the United States will do almost anything to avoid trying a case, rather than to give the individual his day in court. In the instant case the Trial court in effect granted summary judgment while discovery efforts by

Plaintiff-Appellant were being denied by Defendant-Appellees. Furthermore the Defendant-Appellees used a false and humiliating erroneous statement of facts for commercial gain at the expense of the Appellant's Good name and invaded his privacy and intentionally inflicted emotional pain and humiliation on Appellant and his family by Appellees' defamatory "commercial". A clear statement by the Court is necessary so that any and all people shall be safe from "commercial exploitations by greedy corporations and businesses".

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ARTHUR DITMAR

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Appellees

APPEAL FROM THE
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JURISDICTIONAL STATEMENT

OPINION BELOW

The Entry of the United States Court of Appeals, For The Sixth Circuit, Cincinnati, Ohio, affirming the judgment of the District Court,

Northern District of Ohio, Eastern Division is set forth in Appendix A, at Page 60 infra.

The Order of the District Court, Northern District of Ohio, Eastern Division, by the Honorable Alice M. Batchelder, dismissing Appellant's amended Complaint pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure on the ground that Plaintiff-Appellant failed to state any claim upon which relief can be granted, is set forth in Appendix B, Infra, at page 61,

JURISDICTION

Arthur Ditmar, The Appellant herein, appeals from the Order of the United States Court of Appeals, For The Sixth Circuit, Cincinnati, Ohio, which Order Affirmed the Order of the District Court of Ohio, Northern District, Eastern Division, dismissing Appellant's amended Complaint pursuant to Rule 12 (b)(6) of The Federal Rules of civil Procedure. Said Order of the Court of Appeals was entered on May 11, 1988 and is set forth in Appendix A. The order of the District Court was entered on June 25, 1984 and is set forth in Appendix B.

Jurisdiction in the District Court was founded on on diversity of citizenship, 28 U.S. C. Sec. 1332.

The parties are citizens of different states and the amount in controversy exceeds $10,000.00.

A Notice of Appeal to this court was duly filed in the United States Court of Appeals For The Sixth Circuit, Cincinnati, Ohio on the 28th day of July, 1988, see Appendix C, Page 68 infra.

This Appeal is being docketed in this court within ninety (90) days from the order affirming the District Court's Order dismissing Appellant's amended complaint. The jurisdiction of this court is invoked pursuant to 28 U.S. C. 1254(c)

STATEMENT OF THE CASE

I. CASE HISTORY

The following television commercial was made by Appellant, Needham Harper, Worldwide, Inc. for use and distribution by Appellant, Anheuser-Busch, Inc.

RADIO ANNOUNCER - Berra play once again it was a hard hit drive down the first base side but Nelsen fielded it on the first hop tagged the bag at first to Berra he was out and then Mantle could of been in a run down but it was not the case he dove back safely to first base. Here's a ball one too high now to Mazeroski and the Yankees have tied the game in the top of the ninth inning. Well a little while ago when we mentioned the big one.....

Commercial Announcer - Season after

season the people who brew Budweiser have been proud to be part of America's national past time with you. **RADIO ANNOUNCER** - Art Ditmar throws, here's a swing and a high fly ball going deep into left back to the wall all the way..BAR CROWD CHEERS (sounds like "The Pirates win the series")

The pertinent statements in the Amended Complaint of appellant, Ditmar, are set forth as follows:

4.) Plaintiff (Appellant herein), now employed as a municipal recreation and athletic director for the City of Brook Park, Ohio, was formerly a major league baseball pitcher for the New York Yankees baseball club.

5.) At all time pertinent hereto, Plaintiffs duties as the Recreation Department Director

encompassed management and supervision of the Adult Men's and Women's and the Youth Athletic Programs. The Youth Athletic Program covers both boys and girls. On occasions he still instructs in the general athletic programs and on a consistent basis still gives pitching instruction in the Youth Program. Plaintiff has written an Instruction Manual for the City's Youth Program covering batting, pitching, throwing and fielding and Plaintiff is still engaged in his profession in special "Old Timer" games; he will be playing in two "Old Timers" games in 1986, and depending on certain circumstances, may receive compensation and expenses for playing in said games. Likewise, Plaintiff is still and has been paid "appearance money" as a former baseball star at

certain charitable golfing events in Michigan, Ohio, and elsewhere.

6.) At all times pertinent to Plaintiff's Complaint, Defendant Anheuser- Busch, Inc. was engaged in the production, distribution and marketing of beer in Ohio and other states.

7.) At all times pertinent to Plaintiff's Complaint, Defendant Needham, Harper, Worldwide, Inc., was engaged in activities including planning and producing commercial advertisements for Anheuser-Busch, Inc., and their clients.

8.) The Defendant planned, produced and caused the television broadcasting of Budweiser beer commercials during the major league baseball World Series which was conducted in autumn, 1985.

9.) One such Budweiser commercial mentioned Plaintiff by name. The visual portion of the commercial depicted person gathering around a radio set. The audio portion purported to be an announcer's voice on the radio, who reports to the listeners that Plaintiff threw a seventh-game pitch in the 1960 World Series to Pirates batter Bill Mazeroski, who hit the pitch for a series-winning home run.

10.) The Budweiser's Commercial reference to Plaintiff was false and was made with such utter disregard for the truth, that the commercial constituted slander, per se, and was done with legal malice, since Plaintiff did not throw the pitch which cost the Yankees the 1960 World Series which the Defendants' well knew.

11.) Defendants caused the false and damaging commercial to be broadcast in this jurisdiction and elsewhere to unknown millions of television viewers during the first and second game of the 1985 World Series. Defendants knew or through the exercise of reasonable car (sic) should have known, and, if they had checked the official record books, would have known that the statements in the commercial were false. Defendants knew or in the exercise of reasonable care should have known after the First World Series Game on Saturday, October 19, 1985, that their commercial was false and, in fact, by the Third World Series Game on Tuesday, October 22, 1985, had muddled over the commercial so that you could not hear the name of the Plaintiff. Then with full knowl

edge of the falsity of the commercial's reference to Plaintiff, and with utter disregard for the reputation, emotional well-being, professional reputation, status as the Recreation Director for the City of Brook Park, Ohio, and his family's well-being, maliciously slandered the Plaintiff, per se, by using and repeating continually the false commercial on Thursday, October 24, 1985, Saturday, October 26, 1985, and Sunday, October 27, 1985, the Fifth, Sixth, and Seventh World Series Games in 1985 respectively.

"PLAINTIFF'S CLAIM"

12.) Plaintiff was libeled and/or slandered by Defendants, who caused the broadcasting of the erroneous Budweiser commercial. The commercial's false reference to

Plaintiff was malicious as a matter of law.

13.) Defendants' wrongful conduct as alleged caused damage to Plaintiff's reputation as an outstanding former major league pitcher, a reputation treasured by Plaintiff for its own sake but also because he remains employed in the area of sports and recreation. Defendants' wrongful conduct caused Plaintiff and his family emotional pain and embarrassment. The aforementioned repetitious use of the commercial was done maliciously with utter disregard for the truth of the matters contained in said commercial, with utter disregard for Plaintiff's reputation, and opportunities to earn compensation in "Old Timers" games and "appearance money" at various golf charitable fund

raising events.

14.) Defendants' conduct in permitting the erroneous commercial to be broadcast again, after the error concerning Plaintiff was once detected and corrected, was grossly negligent, malicious and slanderous, per se."

After many extensions and filing of briefs and prior to Plaintiff/-Appellant's filing on August 26, 1986, of his First Set of interrogatories, (Interrogatories of Plaintiff propounded to Defendant Needham, Harper, Worldwide, R 36, 8/29/86 addressed to Defendant/Appellee Worldwide) Defendant/Appellees Needham, Harper, Worldwide, Inc., Filed a Motion To Dismiss the Amended Complaint on June 30, 1986. (Motion to Dismiss, R 25, 6/30/86) The Motion to Dismiss the Amended Complaint filed on June 30th,

1986 was granted on June 25, 1987. (Order, R 44, 6/25/87)

On November 24, 1986, Worldwide filed a Motion for Extension of Time To Respond To Plaintiff's Interrogatories, (Motion of Needham, Harper Worldwide for Extension of Time, R 41, 11/24/86) and on December 4, 1986, Plaintiff/Appellant filed an Answer Brief objecting to Worldwide's Motion For An Extension of Time. (Motion of Needham, Harper for Extension of Time, R 42, 11/2/86; Answer Brief of Plaintiff to Defendant Needham Harper, etc., R 42, 12/4/86) Then, while out of rule, Worldwide filed a Motion For Leave To File Brief in Reply to Plaintiff's Answer Brief. (of Defendant Needham Harper, et al., for leave to Reply, R 43, 1/7/87) The trial court never ruled on these

motions or briefs and never required Worldwide to respond to Plaintiff's Interrog- atories. Said Interrogatories would show that Defendant/-Appellees are still using the false and libelous "Ditmar Commercial".

A supplemental Answer Brief of Plaintiff/Appellant to Defendant Needham, Harper Worldwide's Motion to Dismiss and Motion for Extension Of Time To Respond To Plaintiff's First Set of Interrogatories was filed on February 20, 1987. (Supplemental Answer Brief of Plaintiff, R 43 (sic) 2/20/87). An Oral Hearing was requested.

No further action was taken by the trial court until it entered its Dismissal Order (Order, R 44, 6/25/87) on June 25, 1987. Appellant timely filed his Notice of Appeal on

July 24, 1987. (Notice of Appeal, R 45, 7/24/87)

The Trial Court erred in dismissing Plaintiff's Amended Complaint pursuant to the motions of Defendants to dismiss pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure on the ground that Plaintiff has failed to state any claim upon which relief can be granted.

II. THE QUESTIONS ARE SUBSTANTIAL

The Questions Presented Are Substantial

There is a growing malaise amongst the citizenry that the "courts of the Land" are not responsive to the "needs" of the people; i.e., you must be a Firestone or Busch, General

Motors or General Electric, or a "Hustler" or the Insurance Industry to be heard by the court or to be treated fairly by the Government, that "form" takes precedence over "Substance", and that the courts of the United States will do almost anything to avoid trying a case, rather than to give the individual his day in court. In the instant case, the Trial Court in effect granted summary judgment while discovery efforts by Plaintiff-Appellant were being denied by Defendants Appellees. Furthermore the Defendant-Appellees used a false and humiliating erroneous statement of Facts for commercial gain at the expense of the appellant's good name and invaded his privacy and intentionally inflected emotional pain and humiliation on Appellant and his

family by Appellees' defamatory "commercial". A clear statement by the court is necessary so that any and all people shall be safe from "commercial" exploitations by greedy corporations and businesses.

The facts are undisputed and are reflected in Appellant, Ditmar's, Amended Complaint and on the District Court's Docket.

The first Amendment guarantees of "Freedom of Press" and "Freedom of Speech" have no application to the instant case.

1. CAN DEFENDANTS, A BREWER, ANHEUSER-BUSCH, INC., AND ITS ADVERTISING AGENCY, NEEDHAM, HARPER, WORLDWIDE, INC. PUBLISH DEFAMATORY, EMBARRASSING, FALSE AND HUMILIATING STATEMENTS ABOUT A PRIVATE PERSON IN A

PROMOTIONAL TELEVISION ADVERTISEMENT SOLELY FOR PROFIT MOTIVES, KNOWING THAT SAID STATEMENT IS FALSE, AND THEREBY INVADE HIS RIGHT OF PRIVACY?

Ditmar alleges in his Amended Complaint that Anheuser and Worldwide falsely accused him, a "New York Yankee" of throwing a final seventh-game pitch, the last pitch of the game in fact, to the "Pirate's" batter Bill Mazeroski, who hit the pitch for the Series winning home run. Ditmar alleges publication of said falsehood caused damage to his professional reputation and caused him and his family emotional pain and embarrassment.

Such publication subjected Ditmar and his family to ridicule and contempt and reflected falsely on his

character and reputation as a major league pitcher. It is also alleged that Ditmar would be damaged in his pocketbook by being denied the opportunity to appear in certain "Old Timers" games and various charitable golf events, for which he received appearance money.

The correct rule of law concerning the instant case is set forth in Goudy v. Dayton Newspapers, Inc. et al., 14 Ohio App. (2d) 207, 43 O Ops 2d 444, (1967), in syllabus 1 as follows:

"Libel and Slander, Page §21.

"Libel and Slander, O Jur 2d §22

> "Published language which, of itself, reflects upon the character of a person by bringing him into ridicule, hatred or contempt, or affects

him injuriously in his trade of profession, and which is not ambiguous and uncertain of definition, constitutes libel per se, and the person so libeled may maintain an action for libel and recover damages without pleading or proving special damage. The words used must, of themselves, injuriously affect such person. If they can reasonably have another and innocent meaning and are not libelous of themselves, they are not libelous per se." (Emphasis added)

Furthermore, in Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985), an action involving a false credit report; the Supreme Court stated that different rules apply when false and defamatory

statements "do not involve matters of public concern." This case is more fully discussed in Issue 2 set forth hereinafter, but the Court upheld the trial Courts' statement that the report was libelous per se and that the plaintiff was not required to prove actual damages as such damages and loss are conclusively presumed.

The Ditmar Commercial was false, it defamed Ditmar and held him up to undeserved ridicule, humiliation and contempt.

Although Ditmar was employed as the Recreation Department Director; appeared in "Old Timers" games, and received appearance money for playing in certain charitable golf events (only on special occasions), he was hardly a national sports figure or "public" figure at the time of the

broadcasting of the false and libelous commercial herein.

As more fully set forth in discussion of Issues II, and III, Anheuser and Worldwide's actions are not actions of public concern so that Ditmar need show or plead special damages.

Futhermore in Dunn & Bradstreet, Inc., v. Greenmoss Builders, Inc. 105 S. Ct. 2939, 2940, 2942 (1985), the court, affirming the jury verdict in the state trial court, stated in Syllabus 3 as follows:

"3. Libel and slander

"False credit report which was

issued to construction contractor's creditors and which was clearly damaging to contractor's business reputation did

not involve matters of public concern which would require showing of "actual malice" to permit recovery of presumed and punitive damages in defamation action....

(emphasis added)

"After trial the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damage and $300,000 in punitive damages. Petitioner moved for a new trial. It argued that in Gertz v. Robert Welch, Inc., supra, at 349 94 S. Ct. at 3011, the Court had ruled broadly "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of falsity or reckless

disregard for the truth," and it argued that the judge's instruction in this case permitted the jury to award such damages on a lesser showing. The trial court indicated some doubt as to the Gertz applied to "non-media doubt as to whether Gertz applied to "non-media cases,: but granted a new trial "(b)ecause of.....-dissatisfaction with its charge and...conviction that the interests of justice require(d)" it. App. 26.

"The Vermont Supreme Court reversed. 143 Vt. 66, 461 A. 2d 414 (1983). although recognizing that "in certain instances the distinction between media and nonmedia defendants may be difficult to draw,: the court

stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services." Id., at 73, 461 A. 2d at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by New York Times (Co v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed 2d 686 (1964),) and its progency." 143 Vt. at 73-74, 461 A. 2d at 417-418. It held that the balance between a private plain

tiff's right to recovery presumed and punitive damages without a showing of special fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant." Id., at 75, 461 A.2d, at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in Gertz are inapplicable to non-media defamation actions." Ibid., 461 A.2d, at 75.

Obviously, Anheuser's and World-wide's actions are not a "public concern" in this instance and Ditmar is entitled to his day in Court.

The Trial Court did not look at all the surrounding circumstances as

is generally required by law. The publication of such commercial was made on numerous occasions with full knowledge of its falsity, or with reckless disregard of its truth. Ditmar alleges in his Amended Complaint that he might lose payment from not being asked to appear in the New York Yankees' "Old Timers" game and also lose appearance money from charitable golf events.

2. CAN A PERSON ONCE A PUBLIC SPORTS FIGURE, BE HELD UP FOR PUBLIC HUMILIATION, RIDICULE, SCORN, EMBARRASSMENT AND HIS RIGHT OF PRIVACY INVADED, BY TWO PROFIT MOTIVATED CORPORATIONS, ANHEUSER-BUSCH, INC., AND ITS ADVERTISING AGENCY, NEEDHAM, HARPER, WORLD- WIDE, INC., DEFENDANTS

HEREIN, WHO WILLFULLY, KNOWINGLY AND MALICIOUSLY PUBLISHED IN A TELEVISION COMMERCIAL FALSE, HUMILIATING AND EMBARRASSING LIES ABOUT SAID SPORTS FIGURE, TWENTY-FIVE YEARS AFTER THE SO-CALLED EVENT.

The instant case is somewhat analogous to the case of Lahr v. Adell Chemical Co., inc. et al., 300 F 2d 256 in which Bert Lahr claimed damages to his "professional reputation as an entertainer as the result of anonymous imitation of his unique style of vocal delivery in a television commercial." The Federal District Trial Court rendered judgment and dismissed the Complaint, the First Circuit Court of Appeals vacated the judgment and remanded for further proceedings.

Certainly the use of one's name

in a commercial is protected whether or not one is a public figure, and even more so when false claims are made about Ditmar's conduct.

The status of law in libel and slander, or defamation cases is rapidly changing, the subject is quite complex and a clear understanding seems to always be eluding ones' grasp; see Preface, Law of Defamation by Rodney A. Smolla, (copyright (1986))by Clark Boardman Company, Ltd.

Because of the false and malicious dissemination of the Ditmar Commercial by Anheuser and Worldwide, the Trial Court erred in dismissing Ditmar's Amended Complaint

In the Law of Defamation, page 3-8, Smolla, op. cit. stated:

"Speech on matters of purely private concern, Justice power

wrote, "is of less First Amendment concern." Endorsing the common law rule of presumed damages, Powell noted that the "rationale of the common law rules has been the experience and judgment of history that "proof of actual damages will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of the publication, it is all but certain that serious harm has resulted in fact.' As a result, "courts for centuries have allowed juries to presume some damage occurred from many defamatory utterances and publications," a rule that "furthers the state interest in providing remedies for defamation by

ensuring that those remedies are effective." Powell then announced the central holding of the case: "In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages--even absent a showing of 'actual malice'.

(emphasis added)

In the instant case there is "actual malice" as Anheuser and Worldwide continued publication of the false commercial even after knowledge of its falsity.

The trial court seemed to feel that since Ditmar was the Recreation Director for the City of Brookpark, Ohio, he might be a private figure and

therefore even though Anheuser and Worldwide's commercial was false, that said actions gave no basis for a cause of action on Ditmar's behalf. This clearly is contrary to the holding in Dunn & Bradstreet, Inc., v. Greenmoss builders, Inc., op cit.

Furthermore in Time Inc., v. Firestone 424 U.S. 448, 460 (1976), the U.S. Supreme Court stated:

> "...this does not transform the action into something other than an action for defamation as that term is meant in Gertz. In that opinion we made it clear that States could base awards on elements other that injury to reputation, specifically listing "personal humiliation and mental anguish and suffering" as examples of injuries which might

be compensated consistently with the Constitution upon showing of fault."

(emphasis added)

Such injuries are recognized in Ohio in footnote 5 of Thomas H. Maloney & Sons, Inc., v. E.W. Scripps Co., et al., 43 O App 2d 105, 72 O Ops 2d 313, 316 (1974), wherein the Court of Appeals of Cuyahoga County, Stated:

"Actual injury is not limited to out of pocket expenses, but may include customary types of actual harm inflicted by defamatory falsehood such as impairment of reputation, personal humiliation, mental anguish and suffering.

(Emphasis added)

3. DID THE TRIAL JUDGE ERR IN GRANTING DEFENDANT'S MOTION

PURSUANT TO FEDERAL CIV. R. 12(B)(6) TO DISMISS PRIOR TO DEFENDANTS ANSWERING PLAINTIFF'S FIRST SET OF INTERROGATORIES THAT SPECIFICALLY WOULD HAVE SHOWN LEGAL MALICE BY CONTINUED PUBLICATION OF THE FALSE STATEMENTS BY DEFENDANTS.

The trial court clearly erred in granting a dismissal pursuant to Fed. Rules of Civil procedure 12 (b)(6), 28 USCA.

In De La Cruz, et al., v. Tormey, et al., 582 F 2d 45, the Ninth Circuit Court of Appeals (1978), stated in the headnotes:

"1. Federal Civil Procedure - 1772

Motion to dismiss for legal insufficiency is viewed with disfavor in the federal courts.

Fed Rules Civ. Proc. Rule 12 (b), 28 U.S.C.A.

"2. Federal Civil Procedure - 1772, 1829

On motion to dismiss for legal insuff- iciency, issue is not whether a plaintiff's success on the merits is likely, but rather whether the claimant is entitled to proceed beyond threshold in attempting to establish his claims; moreover, in passing on motion to dismiss, allegations of complaint should be construed favorably to the pleader. Fed. Rules Civ. Proc. Rule 12 (b), 28 U.S.C.A."

The judgment of dismissal was reversed and the case remanded to the Trial court. A Motion to Certify was denied in Tormey v. De La Crus, 60 L Ed 2d

1072.

Likewise in United States v. City of Redwood City, 640 F 2d 963, 966 (1981), the Ninth Circuit Court of Appeals, reversed a trial courts dismissal pursuant to Fed Rules Civ. Proc., Rule 12 (b), 28 U.S.C.A. stating:

> "... But even if the face of the pleadings indicate that recovery is very remote, the claimant is still entitled to offer evidence to support it claims. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed 2d 90 (1974) See also Song Jook Suh v. Rosenberg, 437 F. 2d 1098, 1100 (9th Cir 1971). Also, in acting on a motion to dismiss, the plaintiff's allegations must be assumed to be true and the

complaint must be construed in the light most favorable to the plaintiff. California Dump Truck Owners Assn. v. Associated General Contractors of America, 562 F. 2d 607, 614 (9th Cir. 1977); McKinney v. DeBord, 507, F 2d 501, 503 (9th Cir. 1974).

The Answer to Ditmar's Interrogatories propounded to Worldwide, would have shown that the Ditmar commercial was used after the 1985 World Series, (see Affidavits of Tom Beyers and Todd Ditmar attached to Plaintiff's Supplemental Answer Brief to Defendant Needham, Harper Worldwide Inc.'s Motion To Dismiss and Motion For Extension of Time To Respond To Plaintiff's First Set of Interrogatories), filed February 20, 1988.

Thus, it is clear that the Trial

Court made its ruling to dismiss prior to knowledge of all the facts to properly determine the action to be taken and before additional evidence of "malice" was presented to the court from the Answers to the proposed Interrogatories.

As previously cited in Thomas H. Maloney & sons, Ic., v. E.W. Scripps Company, et al. 43 O App 2d 105, 72 OO 2d 313, 315, 317, (1974), the Cuyahoga County Court of Appeals reversed the trial court's granting of Defendant's Motion for Summary Judgment.

The Court stated as follows:

At P. 315, 316:

***"Revelation of the full impact of the Gertz decision on Ohio libel law necessarily awaits possible future court interpretations and legislative enactments.

One clear result of the Gertz decision is that a plaintiff may no longer relay upon the doctrine of libel per se, as it was heretofore recognized in Ohio, to form the basis of a libel suit. This result is mandated by the holding of the Gertz case enunciated in the following two quotes:

(1) "(W)e hold that the states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." Gertz, supra, 810. (emphasis added)

The court of Appeals added the following explanatory footnotes on page 315 and on page 316:

[1]Such malice has been termed "express malice" and consists of an express design to inure, based upon ill will, hatred, revenge or reckless disregard of the rights of another. 34 Ohio Jur. 2d Libel and Slander, Sec. 58 Express and Implied Malice (1958) Express malice is to be distinguished from actual malice, defined by the U.S. Supreme Court to mean knowledge of falsity or reckless disregard of the truth.

[5]Actual Injury is not limited to out of pocket expenses, but may include customary types of actual harm inflicted by defamatory falsehood such as impairment of reputation, personal humiliation, mental anguish and suffering. Gertz, supra, at 811 (emphasis added.

At P. 317:

"Finding that the false quotation

> is defamatory on its face, we remand to the trial court of a determination of the material issued so fact, to-wit: (1) Was the article published with actual malice? If this finding is made, (112) general damages may be presumed, and the plaintiff may be entitled to punitive damages; (2) If the article is found to have not been published with actual malice, was the defendant guilty of some other degree of fault, whether negligence or express malice; (3) If it is found that the defendant was guilty of negligence or express malice, but not actual malice, the plaintiff is entitled to

prove his actual damages.

"Accordingly, the judgment of the

trial court is reversed and remanded for further proceedings consistent with this decision."

It is important to remember that there are jury questions of fact to be determined in this matter. On pages 4 and 5 of Ditmar's Amended Complaint, it is stated:

"11.

***<u>then with full knowledge of the falsity of the commercial's reference to plaintiff, and with utter disregard for the reputation, emotional well-being, professional reputation, status as the Recreation Director for the City of Brook Park, Ohio, and his family's well-being,</u>

maliciously slandered the plaintiff, per se, by using and repeating continually the false commercial on Thursday, October 24, 1985, Saturday, October 26, 1985, and Sunday October 27, 1985, the Fifth, Sixth, and Seventh World Series Games in 1985 respectively.

[7]Plaintiff alleges that the article was printed with knowledge that it was false. Defendant denies this claim.

"13.

***Defendant's wrongful conduct caused plaintiff and his family emotional pain and embarrassment. The aforementioned repetitious use of the commercial was done maliciously with utter disregard for the truth of the matters contained in said commercial,

with utter disregard for plaintiff's reputation, and opportunities to earn compensation in "Old times" games and "appearance money" at various golf charitable fund raising events.

Obviously pursuant to the Maloney case the question is was there actual malice; i.e. did Anheuser and Worldwide publish the commercial knowing it was false?

In Worldwide's Motion for Dismissal pursuant to Rule 12 (b), the alleged facts must be assumed in the most favorable light to Ditmar in this case

In Wegner v. Rodeo Cowboys Association, Inc., et al., 417 F 2d 881, 883, (1969) the court upheld a verdict for plaintiff, a retired Cowboy Rodeo Rider, against Defendants

a Rodeo Association and George Williams, presumably an officer of said association. In upholding the verdict which granted general damages, and exemplary damages the court stated:

At P. 883:

> "There were no special damages shown by the plaintiff. The trial court submitted the case to the jury on general damages on the ground that under Colorado law there was an exception to the general rule relating to libel per quod to permit submission without the showing of special damages when the imputation affects plaintiff's trade, profession or office. Appellant urges that this is not the applicable rule, and further the

damages awarded under the proof are excessive. We recently decided a defamation case raising an issue of damages but this issue was not presented or considered, M. F. Patteson Dental Supply Co. v. Wadley, 401 F. 2d 167 (10th Cir. 1968).

Again it is important to remember that the instant case is not matter of public concern, but is the attempt by an individual to be fairly compensated from one of if not the World's largest Breweries and its large advertising agency, both of whom acted outrageously and with utter disregard for Ditmar's right of privacy and to be free from humiliation and ridicule and embarrassment in his private, business, and social life due to the knowingly false and malicious repeated

publication of said falsehood by Defendants. (emphasis added)

In Diplomat Electric Inc., v. Westinghouse Electric Supply Co., 378 F 2d 377, 378, 386, (1967) the court stated in "Syllabus 22 Federal Civil Procedure:

"22 Federal Civil Procedure §2461

Summary judgment rule should be invoked cautiously to end that parties may always be afforded trial when there is bona fide dispute of fact between them.

And further on P. 386 in reversing the trial court's granting of Summary Judgment the court stated:

*** "The district court also found that the plaintiff had not suffered any damage resulting from the false statement made to Mr. Johnson, but that on the

contrary the plaintiff had been paid for that construction job and had been permitted to bid on other jobs, and summary judgment was entered on this claim also. However, as we have heretofore pointed out, the character of the false statements here involved did not require proof of special damage.

"We, of course, are not here passing on the ultimate rights of these parties which will be determined when the cause is tried on the merits. We merely hold that the district court, having found that the complaint sufficiently alleged falsity and malice, erred in concluding that proof of special damage was necessary to support

the allegations of the Complaint. We conclude that there were present genuine issues of fact and that the trial court, therefore, erred in granting summary judgment. The cause must accordingly go back to the district court for trial on its merits.

See also, Time Inc., v. Alice Firestone, 424 US 448, 96 S Ct. 958, 47 L Ed 2d 154, which allows recovery to a non-public figure for injury other than to business reputation, such as personal humiliation and mental anguish and suffering, i.e., "emotional well being" and "caused Plaintiff and his family emotional pain and embarrassment." See page 4 of Amended Complaint. (Amended Complaint, R-20, 6/20/86)

The trial court erred in considering matters outside of the pleadings and also in effect converting the motion to dismiss under Rule 12(b)(6) to one for summary judgment provided for in Rule 56, and by denying Appellant Ditmar reasonable opportunity for discovery.

In Gay v. Wall 761 F. 2d 175, 177 (1985) Syllabus 2 states:

2. Federal Civil Procedure 2533

> Notification that a Motion To Dismiss may be converted to a Motion For Summary Judgment is only one of the requirements of applicable federal rule of civil procedure; once notified, party must be afforded reasonable opportunity for discovery before motion to dismiss may be converted and summary judgment

granted. Fed. Rules Civ. Proc. Rule 12(b)(6), 28 U.S.C.A.

Syllabus 3 states:

3. Federal Civil Procedure 2533

Treatment of defendants' motion to dismiss as a motion for summary judgment was an abuse of discretion, where plaintiff who had filed four affidavits, was ill equipped to counter defendants' affidavits due to defendants' objections to plaintiff's initial interrogatories. Fed. Rules Civ. Proc. Rules 12(b)(6), 56, U.S.C.A. (emphasis added)

Further on page 177, the court of Appeals, Fourth Circuit in the decision stated:

(3) In this case summary judgement was

granted when the plaintiff had

> barely begun discovery.... It was the lack of a reasonable opportunity for discovery which made conversion of the rule 12(b)(6) motion "wholly inappropriate." Because Gay was not afforded an opportunity for reasonable discovery, the district court's treatment of the Motion To Dismiss as a Motion For Summary Judgment was an abuse of discretion. We therefore reverse the judgment of the district court on this point and remand the case for further proceedings.

Furthermore the District Court should not have dismissed, Appellant's case without granting Appellant the opportunity to plead further facts or to further amend his complaint. In Robertson v. Dean Witter Reynolds,

Inc. 749 F 2d. 530, 541 (1984) the last paragraph of the Court of Appeals, Ninth Circuit stated:

> (16) Although Robertson chose not to plead any facts from which scienter could be inferred, it is not clear from the record that he cannot plead such facts. Since dismissal under Fed. R. Civ. P. 12(b)(6) should not be affirmed unless it is clear that the complaint could not be saved by any amendment, See Gillespie v. Civiletti 629 F.2d 637, 640 (9th Cir. 1980), we remand to give Robertson the opportunity to plead Scienter.
>
> REVERSED AND REMANDED.

Although the case of Schockley v. Jones 823 F.2d 1068, 1073 (1978), involves a "sua Sponte" dismissal the

court of Appeals for the Seventh Circuit states in paragraph (6) on page 1073 as follows:

> "(6) A dismissal under Rule 12(b)(6) without notice or a hearing is clearly improper. Because a dismissal for failure to state a claim is a decision on the merits with full res judicata effect, see Winslow v. Walters, 815 F.2d 1114, 1116 (7th Cir. 1987), the plaintiff is permanently denied his or her day in court if the court fails to provide notice that the complaint is defective, and if the plaintiff has no opportunity to persuade the court that the complaint states a claim the unfairness of this result is obvious.

In the instant case appellant was" waiting for answers to Interrogatories filed by him and for a ruling of the trial court concerning an Extension of Time within which to answer said interrogatories requested by Appellee, Needham, Harper Worldwide, Inc. filed on or about this 24th day of November, 1986, which Extension was objected to by appellant. The Trial court never ruled on the request for extension of time and the objections thereto but instead, without a hearing or notice to appellant, granted the Motion to Dismiss without affording any discovery to Appellant.

Likewise it is apparent from the ruling in Kelson v. City of Springfield, 767 F.2d 651, 652, 656 (1985), Court of Appeals for the Ninth Circuit, that the District Court's order

of Dismissal was improper without allowing Appellant to make further amendments to his complaint. The Court of Appeals Stated in Syllabus 4:

> "4. Federal Courts 763
>
> Although Court of Appeals may affirm a district Court's dismissal on any basis fairly supported by the record, dismissal under Federal Civil Rule 12(b)(6) should not be affirmed unless it is clear that complaint could not be saved by any amendment. Fed. Rules Civ. Proc. Rule 12(b)(6), 28 U.S. C.A."

and in discussing Syllabus 4 on page 656 the Appellate Court Stated:

> "(4,5) Although we may affirm a district court's dismissal on any basis fairly supported by the record (Las Vegas v. Clark

County, 755 F.2d 697, 701 (9th Cir. 1985)), a dismissal under Fed R. Civ.P. 12(b)(6) should not be affirmed unless it is clear that the complaint could not be saved by any amendment. Robertson v. Dean Witter Reynolds, Inc. 749 F.2d 530, 541 (9th Cir. 1984). It is not clear from the record that the Kelsons cannot plead facts supporting the existence of an official governmental policy which deprived them of the society of their child. The district court's failure to address this question persuades us that it would be in the interests of justice to remand this matter to give the Kelsons the opportunity to amend their section 1983 claims against the

city and the School District to comply with the requirements of Monell and Tuttle. See Hirst v. Gertzen, 676 F.2d 1252, 1264-65 (9th Cir. 1982) (plaintiff afforded opportunity to amend pleadings on remand to allege cognisable section 1983 claim against governmental entities where Monell was decided after governmental entities had been dismissed from action)..."

The District Court also was in error when it ruled that Appellant had to plead special damages since the publication was not libelous per se (see Joint Appendix page 55 of Record)

However a more accurate statement of the law pertinent to this case is contained in Brown & Williamson Tobacco Corporation v. Jacobson, 827

F.2d, 1119, 1120, Court of Appeals, Seventh Circuit (1987) wherein in Syllabus 10, 11, and 12, the court stated:

"10. Lible and Slander 33

In certain actions in which defamatory material is characterized as defamatory per se, plaintiff may recover general compensatory damages without proving special damages, under doctrine of presumed damages which allows assessment of damages without proof of impairment of reputation."

"11. Libel and Slander 33

Under doctrine of presumed damages in defamation suit, presumed damages are an estimate, however rough, of probable extent of actual loss person had

suffered and would suffer in future, even though loss could not be identified in terms of advantageous relationships lost, either from monetary or enjoyment of life standpoint.

"12. Libel and Slander 9(7)

Libelous news broadcast leading viewers to believe that cigarette manufacturer had deliberately adopted advertising policy designed to start children smoking and to associate smoking with pleasurable illicit activity prejudiced manufacture in its trade or business in a manner that was so obviously and naturally injurious that proof of injurious character of material could be dispensed with under doctrine of presumed damages."

ARGUMENT

Stripped of all legal verbiage and obfuscation the sole question presented here is:

> Can two large corporations hold up the Appellant to public ridicule and scorn, and profit thereby from the use of the plaintiff's name and reputation as a former baseball star pitcher, by invading his right to privacy and publishing false statements concerning plaintiff in a television commercial without paying damages or without obtaining his consent.

The answer must be NO!!

This instant case is not limited to the law of the State of Ohio as

the Act complained of (the use of Arthur Ditmar's name in a Budweiser commercial) was televised in all the fifty states of the United States, and presumably Canada, Mexico and in other countries overseas through the Armed Forces television facilities.

Article 5 - Right of Privacy of the New York Code, Civil Rule §50, and §51 provide as follows:

§50 Right of Privacy

> a person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§51 Action for Injunction and for Damages

any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain and equitable action in the Supreme Court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be

unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages...

These laws although codified set forth the general rule of laws to the right of privacy, when a person's name or likeness is used for advertising purposes.

Ohio has recognized the legal right to maintain an action based on the "Right of Privacy" since at least 1956 when the State Supreme Court upheld the maintenance of such an action in the case of Housh v. Peth, 165 Ohio St. 35 (1956)

1. The right of privacy is the right of a person to be let alone, to be free from unwarranted publicity, and to live without unwarranted interference

by the public in matters with which the public is not necessarily concerned.

2. An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

***

Furthermore although Plaintiff-Appellant may at one time have been a public figure or newsworthy and may have been or even now be the proper

subject of a new or an informative presentation, the privilege to use his name, portrait, or picture does not extend to the commercialization of his name in an advertisement, particularly when said advertisement contains false, embarrassing and humiliating statements which held up the Plaintiff Appellant to shame and ridicule among his friends, associates, co-workers and the public-at-large.

Likewise In Rathkoph v. Walker 73 NYS 2s 111, 112 Syllabus 5 states:

"Any written or printed false accusation

which dishonors or discredits a man in the estimate of the public or his friends and acquaintances or has a reasonable tendency so to do is a 'libel'"

Syllabus 4 States:

"allegation of complaint would be deemed to be true on motion to dismiss complaint for failure to state facts sufficient to constitute a cause of action:

Since the allegation of Plantiff-Appellant's, Amended Complaint state a valid claim for Defamation and for invasion of his Right of Privacy, the action of the District Court in dismissing said Amended Complaint should be revered and the cause remanded for trial.

SUMMARY

Accordingly, Appellant hereby requests that his Motion to Certify be granted so that the significant legal issues that are now ripe for adjudication can be decided.

CONCLUSION

Probable jurisdiction should be noted.

WILLIAM F. SNYDER
Jerome S. Berkeley
JEROME S. BERKELEY
MARSHMAN, SNYDER & CORRIGAN
Counsel for Plaintiff-Appellant

No. 87-3735
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR DITMAR,	)	(filed
	)	stamped
Plaintiff-Appellant	)	5/11/88)
	)	
vs.	)	
	)	
NEEDHAM, HARPER, WORLD-WIDE, INC.; ANHEUSER-BUSCH, INC.	)	ORDER

BEFORE: MERRITT and NORRIS, Circuit Judges; HACKETT, District Judge.*

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, upon due consideration thereof,

IT IS ORDERED that the judgment of the district court be, and it hereby is, AFFIRMED upon the opinion of the district court.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

ISSUED AS MANDATE: June 1, 1988
COSTS: None

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*The Honorable Barbara K. Hackett, United States District Judge for the Eastern District of Michigan, Sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHI0
EASTERN DIVISION

ARTHUR DITMAR,	) CASE No. C86-662
Plaintiff	)(Time stamped June 23, 87)
vs.	)
NEEDHAM, HARPER, WORLDWIDE, INC. et al.	) JUDGE ALICE M. BATCHELDER
Defendant	)

ORDER

This matter comes on before the Court on motions by the Defendants, Anheuser-Busch, Inc. and Needham, Harper Worldwide, Inc., to dismiss Plaintiff's Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that Plaintiff has failed to state any claim upon which relief can be granted. Upon review of the motions, the memoranda of the parties, and the

applicable law the Court finds these motions well taken and they are hereby granted.

I. FACTS

Plaintiff, a former major league baseball pitcher from 1954 to 1962, is currently employed as a municipal recreation and athletic director for the City of Brook Park, Ohio. Plaintiff alleges, and it is not disputed, that Anheuser and Needham planned, produced, and aired Budweiser beer commercials during the 1985 World Series. the visual portion of one of these commercials depicted several persons gathered around a radio. The audio portion contained an actual re-broadcast of a portion of the ninth inning of the seventh game of the 1960 World Series which featured the New York Yankees and the Pittsburgh

Pirates. with the score tied at nine all in the bottom of the ninth, inning, the announcer, Chuck Thompson, reported that the plaintiff delivered a pitch to Pirate hitter Bill Mazeroski, who hit the pitch for a Series' winning homerun. The original broadcast and the rebroadcast were factually correct except for the fact that Plaintiff did not throw the Series' losing pitch. Rather, that pitch was thrown by Yankee Pitcher Ralph Terry. Plaintiff contends that the publication of this commercial constitutes libel and/or slander per se.

II. APPLICABLE LAW

As it pertains to this case, for this publication to be libelous per se, it must appear that the publication reflects upon the character of

the Plaintiff by bringing him into ridicule, hatred or contempt, or affects him injuriously in his trade or business. Cleveland Leader Co. v. Nethersole, 85 Ohio St. 118, 95 N.E. 735 (1911). To constitute slander per se, the publication must affect the Plaintiff in his trade, profession, or office. Motley v. Gombos, 78 Ohio Law Abs. 546, 153 N.E. 2d 391 (1956). If such words can reasonably have another and innocent meaning which is not libelous or slanderous of itself, the publication cannot constitute libel or slander per se. Becker, 165 Ohio St. at 554, 138 N.E. 2d at 395. Additionally, where the works of a publication are not uncertain or ambiguous as to their definition, whether or not they constitute libel or slander per se is a question for the court to decide,

not a jury. Becker, 165 Ohio St. at 554, 138 N.E. 2d at 396. If the Court cannot determine that a publication constitutes libel or slander per se as a matter of law, it may not allow a jury to do so as a matter of fact. Becker, 165 Ohio St. at 556, 138 N.E. 2d at 397.

In cases where there is no libel per se, libel per quod may occur where a publication not per se libelous becomes so by the use of an innuendo which renders the apparently harmless words libelous by use of extrinsic evidence. Becker, 165 Ohio St. at 556, 138 N.E. 2d at 397. It is the sole function of the court, where a publication innocent on its face is claimed to be libelous by innuendo, to determine whether such a claim can be so reasonably justified as to present

a question for jury. Becker, 165 Ohio St. at 556, 138 N.E. 2d at 397. Such actions cannot be maintained in the absence of proof of Special damages. Cleveland Leader, 84 Ohio St. at 118, 95 N.E. at 735; Becker, 165 Ohio St. at 557, 138 N.E. 2d at 397.

Special damages are those which, although a natural and probable consequence of the publication, are not assumed to be necessary or inevitable, and must be shown by allegation and proof. To be recoverable, they must be material, and generally they are of a pecuniary nature. Additionally, they must result from the conduct of a person other than the defamer or the defamed, and such conduct must be directly caused by publication. 17 Am. Jur. 2d Libel and Slander §350 (1970); 35 O. Jur 3d

§§103, 107 (1982). Finally, they must be pleaded with sufficient particularity as to the loss sustained. Grzelak v. Calumet Pub. Co., 543 F. 2d 579, 583-84 (7th Cir. 1975); Novick v. Hearst Corp., 278 F. Supp. 277, 279 (D. Md. 1968); Barton v. Barnett, 226 F. Supp. 375, 377 (N.D. Miss. 1964).

III. SPECIAL DAMAGES

In the instant case, Plaintiff has not alleged any special damages for which recovery may be had. Plaintiff asserts no more than his subjective belief that this publication may cause a prospective loss of earnings by virtue of the fact that he may lose an "opportunity to earn compensation in `Old Timers' games and `appearance money' at various golf charitable fund raising events." (Complaint, #6). In addition to the

fact that Plaintiff did not plead these alleged damages with the requisite degree of specificity or particularity, the best that can be said for them is that they are highly speculative. In the instant case, the publication occurred in October, 1985; the original complaint was filed in February, 1986; an amended complaint was filed in June, 1986; Plaintiff's brief in opposition to Defendant's motion to dismiss was filed in July, 1986; and to date, the 1986 baseball season has come and gone. Still, Plaintiff has been unable to plead any special damages with any degree of specificity or particularity.

Since there are no special damages Plaintiff's case will rise or fall on the question of whether this publication constitutes libel or

slander per se.

IV. PUBLICATIONS WHICH SUBJECT ONE TO CONTEMPT OR RIDICULE

The Court finds that the publication in the he instant case does not constitute libel per se merely because it may have subjected Plaintiff to public ridicule or contempt. While Ohio recognizes a distinction between libel and slander, it is settled by the great weight of authority that, even if printed and published, mere words of ridicule which tend to lessen a man in public esteem or to wound his feelings, are not always actionable without proof of special damages McCarthy v. Cincinnati Enquirer, 101 Ohio App. 287, 302, 136 N.E. 2d 393, 397 (1956); Sweeney v. Beacon Journal Publishing Co. 66 Ohio App. 475, 479, 35 N.E. 2d 471, 473 (1941). To be

actionable without proof of special damages, the printed words of ridicule or contempt must relate to matters which are required either by moral code or by the law of the land. McCarthy, 101 Ohio App. at 302, 136 N.E. 2d at 387 (1956). The basic concept seems to be that it is not libelous to charge a man with doing that which he may lawfully do and which, is not a violation of the moral code. Id.

Although it may not be advisable to deliver an abundance of homerun pitches, or conducive to longevity as a pitcher, such action is not immoral or illegal. In the instant case, the false statement that Plaintiff three the Series' losing pitch does not, without more, impune Plaintiff's character or impute to him any

immorality or violation of law. As a result, no action can be maintained without proof of special damages.

V. PUBLICATIONS WHICH AFFECT ONE INJURIOUSLY IN HIS TRADE OR BUSINESS

This class of libel or slander per se was established to protect one in his office or calling. To be actionable, the plaintiff must be engaged in the office or calling at the time the words complained of were published. Motley v. Gombos, 78 Ohio Law Abs. 547, 153 N.E. 2d 465 (1958). Additionally, the defamation must be of a kind incompatable with the proper conduct of the business, trade, profession of office itself. Motley, 78 Ohio Law Abs. at 548, 153 N.E. 2d at 466.

Plaintiff was engaged as a recreation and athletic director in

the fall of 1985 when the publication complained of was made. The only reference in the publication, however, was to Plaintiff's past profession. Since Plaintiff has not been employed as a major league pitcher since 1962, and since the publication in no way reflects on Plaintiff's current profession, the publication cannot be libelous per se. Moreover, the publication is not of a kind incompatible with the trade or profession of being a major league pitcher, nor does it generally impune Plaintiff's pitching ability or connote a general want of professional skills as a pitcher. Hardly a day goes by during the course of the long baseball season when some pitcher somewhere does not deliver a homerun pitch. Homerun pitches are a fact of baseball life

that any pitcher who throws any appreciable number of pitches must ultimately face. In the 1960 World Series no less than fourteen homeruns were belted out of Forbes Field and Yankee Stadium. Five of these homeruns occurred in the seventh game of the series. This is but one example of the alarming regularity with which hitters "take pitchers downtown.

Whether a publication is libelous or not, is not to be determined from segregated parts of the publication, but from the entire publication, keeping in mind the theme of the composition, the circumstances, and the occasion. McCarthy, 101 Ohio App. at 301, 136 N.E. 2d at 397. Looking at the publication in this context, and interpreting the alleged defamatory statement in the light most

favorable to the Plaintiff, this Court finds that there is no actionable language. The motion of Defendants Anheuser and Needham to dismiss this cause of action for failure to state a claim are hereby granted.

IT IS SO ORDERED.

Dated this 25th day of June, 1987

_____

ALICE M. BATCHELDER

UNITED STATES

DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ARTHUR DITMAR,	) CASE NO.
	) 87-3735
Plaintiff-Appellant	)
	)
vs.	)
	)
NEEDHAM, HARPER, WORLDWIDE, INC.; ANHEUSER-BUSCH, INC.,	)
	)
Defendants-Appellees	)
	)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY ARTHUR DITMAR, PLAINTIFF APPELLANT

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ARTHUR DITMAR,	)	CASE NO.
	)	87-3735
	)	
Plaintiff-Appellant	)	
	)	
vs.	)	
	)	
NEEDHAM, HARPER, WORLDWIDE, INC.; ANHEUSER-BUSCH, INC.	)	
	)	
Defendants-Appellees	)	
	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITES STATES BY ARTHUR DITMAR, PLAINTIFF-APPELLANT

Notice is hereby given that Arthur Ditmar, the Plaintiff Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the United

States Court of Appeals, Sixth Circuit, which decision affirmed the finding of the trial court, granting the motions of the Defendants, Needham, Harper, Worldwide, Inc., and Anheuser Busch, Inc., to dismiss this cause of action for failure to state a claim pursuant to Federal Civ. R. 12 (B)(6). Said order and decision was appealed to the United States Court of Appeals for the Sixth Circuit which appeal was denied on May 11, 1988, by said United States Court of Appeals for the Sixth Circuit.

This appeal is taken pursuant to 28 USC §1254(C).

The Clerk will please prepare a transcript of record in this cause, for the transmission to the Clerk of

the Supreme Court of the Supreme Court of the United States, and include in said transcript the following: The complete record.

The following questions are presented by this appeal:

1.) Can Defendants, a Brewer, Anheuser-Busch, Inc., and its advertising agency, Needham Harper, Worldwide, Inc., Publish defamatory embarrassing, false and humiliating statements about a private person in a promotional television advertisement solely for profit motives knowing that said statement is false, and thereby invade his right of

privacy?

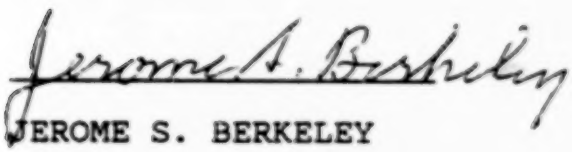
2.) Does an advertisement for profit come under the protection of the First Amendment to the Constitution of the United States of America so that a Brewer, Anheuser-Busch, Inc., and its advertising agency, Needham, Harper, Worldwide, Inc., can subject a private individual to public Humiliation, Ridicule and scorn when such advertisement contains false and embarrassing statements that are known to be false?

3.) Can a person once a public sports figure, be held up

for public humiliation, ridicule, scorn, embarrassment and his right of privacy invaded, by two profit motivated corporations, Anheuser-Busch, Inc., and its advertising agency, Needham, Harper, Worldwide, Inc., Defendants herein, who willfully knowingly and maliciously published in a television commercial false, Humiliating, and embarrassing lie about said sports figure, twenty-five years after the so-called even.

4.) Did the trial Judge err in

granting defendant's motion pursuant to Federal Civ. R. 12(B) (6), to dismiss prior to defendants answering Plaintiff's first set of interrogatories that specifically would have shown legal malice by continued publication of the false statements by defendants.



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Counsel for
Plaintiff-Appellant

PROOF OF SERVICE

I, JEROME S. BERKELEY, one of the attorneys for Arthur Ditmar, Plaintiff Appellant, herein, depose and say, that I served a copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, on Wayne J. Belock, Esq., Arter & Hadden, 1100 Huntington Bldg., Cleveland, Ohio 44115, and to Stephen Durchslag, Esq., Sidley & Austin, One First National Plaza, Chicago, Illinois 60603,Counsel for Appellee Needham, Harper, Worldwide and to Leslie J. Spisak, Esq., Reminger & Reminger, 113 St. Clair Bldg., Cleveland, Ohio 44114-1273, Counsel for Appellee

Anheuser-Busch, by depositing the same in the United States mail, postage prepaid, this _____ day of July, 1988.

Affiant further states that all parties who are required to be served have been served as set forth above.

Jerome S. Berkeley

JEROME S. BERKELEY

STATE OF OHIO)

) SS.

COUNTY OF CUYAHOGA)

Subscribed and sworn to before me, by Jerome S. Berkeley this_____ day of July, 1988.

Witness my hand and official

seal.

PATRICIA A. LEHKY

Notary Public

State of Ohio

My Commission Expires December 17, 1990

PROOF OF SERVICE

I, JEROME S. BERKELEY, one of the attorneys for Arthur Ditmar, Plaintiff Appellant, herein, depose and say I served a copy of the foregoing JURISDICTIONAL STATEMENT, on Wayne J. Belock, Esq., Arter & Hadden, 1100 Huntington Bldg., Cleveland, Ohio 44115, and to Stephen Durchslag, Esq., Sidley & Austin, One First National Plaza, Chicago, Illinois 60603, Counsel for Appellee Needham, Harper, Worldwide and to Leslie J. Spisak, Esq., Reminger & Reminger, 113 St. Clair Ave., Cleveland, Ohio 44114, Counsel for Appellee Anheuser-Busch, by depositing the same in the United States mail, postage prepaid, this 8th day of August, 1988.

Affiant further states that all parties who are required to be served have been served as set forth above.

Dated this 8th day of August, 1988.

Jerome A. Berkeley
JEROME S. BERKELEY

STATE OF OHIO)
) SS.
COUNTY OF CUYAHOGA)

Subscribed and sworn to before me by Jerome S. Berkeley this 31st day of August, 1988.

Witness my hand and official seal.

Patricia A. Lehky
PATRICIA A. LEHKY
Notary Public

State of Ohio
My Commission Expires December 17, 1990

AFFIDAVIT OF MAILING

PURSUANT TO RULE 28.2 OF

THE RULES OF THE SUPREME COURT

OF THE UNITED STATES

I, JEROME S. BERKELEY, one of the Attorneys for Arthur Ditmar, Plaintiff Appellant, in the case of Arthur Ditmar v. Needham, Harper, Worldwide, Inc., et al., state that the Jurisdictional Statement in the instant case was deposited in Priority U.S. Mail on August 8, 1988 in compliance with Rule 28.2.

Affiant further saith naught.

Jerome S. Berkeley

JEROME S. BERKELEY

STATE OF OHIO)
) SS.
COUNTY OF CUYAHOGA)

Subscribed and sworn to before me by Jerome S. Berkeley this 31st day of August, 1988.

Patricia A. Lehky

PATRICIA A. LEHKY, Notary Public
State of Ohio
My commission expires Dec. 17, 1990

Supreme Court, U.S.
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SEP 12 1988
JOSEPH F. SPANIOL, JR.
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No. 88-405

IN THE

Supreme Court of the United States

October Term, 1988

ARTHUR DITMAR,

Petitioner,

v.

NEEDHAM HARPER WORLDWIDE, INC.,
and
ANHEUSER-BUSCH, INC.,

Respondents.

OPPOSITION OF RESPONDENTS NEEDHAM HARPER WORLDWIDE, INC. (NOW KNOWN AS DDB NEEDHAM WORLDWIDE, INC.) TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AUGUST DITMAR

Petitioner,

v.

NEEDHAM HARPER WORLDWIDE INC.
and
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QUESTION RESTATED

Whether the allegation that Needham Harper Worldwide, Inc. falsely stated that Arthur Ditmar threw a single home run pitch while he was a professional baseball player in 1960 states a claim for defamation *per se*, when the complained of statement was made more than twenty years after Ditmar had retired from professional baseball?

STATEMENT REQUIRED BY RULE 28.1

Respondent Needham Harper Worldwide, Inc. ("Needham"), which has changed its name to DDB Needham Worldwide, Inc., is a wholly-owned subsidiary of Ommicom Group, Inc. Ommicom Group has no parent company. In addition, BBDO Worldwide is a wholly-owned subsidiary of Ommicom Group.

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IN THE

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Respondents.

REASONS FOR DENYING THE WRIT

Petitioner seeks review of the Sixth Circuit's holding that the District Court properly dismissed his amended complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state any claim against Needham upon which relief can be granted. Petitioner's claim in the District Court was one for defamation. The Sixth Circuit's holding is simply a correct application of well-settled principles of law to the unique facts of this case.

1. Petitioner, a former major league baseball player and currently a municipal recreation and athletic director, sought recovery of general and punitive (but not special) damages against Needham and Anheuser-Busch, Inc. based upon the broadcast of a Needham-produced Budweiser beer television commercial in the fall of 1985. The commercial included the original live play-by-play radio broadcast of the ninth inning of the seventh game of the 1960 New York Yankees-Pittsburgh Pirates World Series. The original radio broadcast mistakenly made one reference to Petitioner as throwing a pitch for the Yankees in the bottom of the ninth inning when the Pirates' Bill Mazeroski hit a home run. In fact, the Yankees' pitcher was Petitioner's teammate Ralph

Terry. Petitioner claims that the use of the authentic radio broadcast in the commercial defamed him because it damaged his reputation as a former major league pitcher.

On June 25, 1987, the District Court issued its order and opinion granting Needham's motion to dismiss Petitioner's amended complaint pursuant to Fed. R. Civ. P. 12(b)(6). The District Court found, as a matter of law, that Petitioner had not pled any special damages (and necessarily therefore found that no claim for defamation *per quod* had been stated) and that he had failed to state any claim for defamation *per se.*

Petitioner then appealed the District Court's dismissal order to the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed that order from the bench after oral argument without a written opinion. The Sixth Circuit also held that two additional claims raised by Petitioner for the first time on appeal—a false light invasion of privacy claim (raised for the first time in his appellate reply brief) and an intentional infliction of emotional distress claim (raised for the first time in his appellate oral argument)—were not timely raised. In addition, the Sixth Circuit held that the false light claim was not even cognizable under Ohio law.

2. The undisputed facts precluded Petitioner from stating a defamation claim under well-settled principles of applicable Ohio defamation law. Because Petitioner alleged no special damages, his claim was actionable only if it constituted one for defamation *per se. See, e.g., Becker* v. *Toulmin,* 165 Ohio St. 549, 557, 138 N.E.2d 391, 398 (1956). The determination of whether a statement is defamatory *per se* was a question of law for the District Court to decide. *E.g., Becker* v. *Toulmin, supra,* 165 Ohio St. at 554, 138 N.E.2d at 395-96. As the District Court properly found, the broadcast could not give rise to a claim for either (1) injury caused by holding one up to public ridicule or contempt or (2) for injury to one's reputation—the only two types of reputational

injury which can support a claim for defamation *per se* under Ohio law. *See Motley* v. *Gombos,* 78 Ohio L. Abs. 546, 548, 153 N.E.2d 465, 466 (1958). As to the former, the charge of throwing a home run pitch falls far short of holding Petitioner up to the sort of public ridicule or contempt for which defamation law provides redress because it does not impute criminal or immoral conduct, which is necessary to reach the level of public ridicule or contempt which constitutes defamation. *E.g., McCarthy* v. *Cincinnati Enquirer, Inc.,* 101 Ohio App. 297, 302, 136 N.E.2d 393, 397 (1956). And the charge could not injure Ditmar's professional reputation as a major league ballplayer since he long ago retired from the profession. *E.g., Motley* v. *Gombos, supra,* 78 Ohio L. Abs. at 548, 153 N.E.2d 465, 467. Moreover, Petitioner failed to state a claim for defamation *per se* for yet another reason advanced by Needham, which although not expressly relied upon by the District Court is subsumed in its analysis. That is, it is well-settled that a charge of a single mistake, if throwing a single home run pitch is a mistake at all, cannot support a claim of *per se* defamation. *Motley, supra,* 78 Ohio L. Abs at 548, 153 N.E.2d at 467.

In sum, Ditmar's defamation claim was properly dismissed.

3. The Sixth Circuit also properly rejected Petitioner's invasion of privacy and intentional infliction of emotional distress claims as being untimely. As stated, the privacy claim was first raised in Petitioner's appellate reply brief and the latter was not raised until his appellate oral argument. "It is, of course, axiomatic that an appeals court will not consider an argument not presented to the trial court." *Seegull Manufacturing Co.* v. *NLRB,* 741 F.2d 882, 886 (6th Cir. 1984). *Accord In re Butcher,* 829 F.2d 596, 601 (6th Cir. 1987); *Wright* v. *Holbrook,* 794 F.2d 1152, 1156 (6th Cir. 1986); *Howard* v. *Pierce,* 738 F.2d 722, 723 (6th Cir. 1984). In addition, the false light claim was properly rejected by the Sixth Circuit because it is not even a cognizable claim under Ohio law. *Angelotta* v. *American Broadcasting Corp.,* 820 F.2d 806,

809 (6th Cir. 1987). Petitioner's continued attempt to assert these new claims should be similarly rejected by this Court.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 12, 1988

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No. 88-405

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In The

Supreme Court of the United States

October Term, 1988

ARTHUR DITMAR,

Petitioner,

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NEEDHAM HARPER WORLDWIDE, INC.,
and
ANHEUSER-BUSCH, INC.,

Respondents.

OPPOSITION OF RESPONDENTS ANHEUSER-BUSCH, INC., TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION RESTATED

Whether plaintiff's complaint stated a claim upon which relief could be granted, where the complaint sounded in defamation, and the alleged defamatory language consisted of the rebroadcasting of a misstatement by a radio broadcaster that plaintiff had thrown a home run pitch while he was a professional baseball player in 1960, when, in fact, he had not thrown such a home run pitch?

PARTIES INVOLVED

Anheuser-Busch, Inc. has no parent company, subsidiaries, or affiliates contemplated in Rule 28.1.

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No. _____

In The

Supreme Court of the United States

October Term, 1988

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Petitioner,

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REASONS FOR DENYING THE WRIT

Petitioner seeks review of the decision of the Sixth Circuit which upheld the trial court's dismissal of his amended complaint, pursuant to Fed. Civ. R. 12(B)(6), for failure to state a claim against Anheuser-Busch upon which relief could be granted. The amended complaint of the petitioner sounded completely in defamation. Because the complained-of statements were completely before the court by way of the petitioner's amended complaint, the court was free, as a matter of law, to determine that no defamatory language was used, and that the complaint was therefore legally insufficient to state a claim for relief.

1. On February 2, 1986, petitioner, a former major league baseball player, filed the within action against

Needham Harper Worldwide, Inc. ("Needham") and Anheuser-Busch, Inc. ("Anheuser"). The basis of the petitioner's complaint sounded in defamation. As the complaint stated:

> 7. The defendants planned, produced, and caused the television broadcasting of Budweiser Beer commercials during the Major League Baseball World Series which was conducted in Autumn, 1985.
>
> 8. One such Budweiser commercial mentioned plaintiff by name. The visual portion of the commercial depicted persons gathered around a radio set. The audio portion purported to be an announcer's voice on the radio, who reports to the listeners that plaintiff threw a 7th-game pitch in the 1960 World Series to Pirate's batter, Bill Mazeroski, who hit the pitch for a Series-winning homerun.
>
> 9. The Budweiser commercial's reference to plaintiff was false, because plaintiff did not throw the pitch which cost the Yankees the 1960 World Series.

In fact, it was former Yankee pitcher Ralph Terry, not petitioner, who actually threw the homerun pitch in question.

Needham filed a Motion to dismiss, pursuant to Fed. R. Civ. P. 12 (B)(6), alleging that the complaint failed to state a claim upon which relief could be granted. The basis of Needham's motion was that petitioner had failed to state either a claim for defamation *per se*, or a claim for defamation *per quod*, the only two types of defamation claims which exist at common law. Anheuser joined in Needham's motion to dismiss, on the basis that the substance of Needham's motion applied in identical fashion to Anheuser.

Recognizing that Needham's claim was well-founded, particularly in its assertion that petitioner had failed to plead special damages, petitioner filed an amended complaint, the substance of which was to allege that he had, in fact, incurred "special damages," in that (a) he still provided athletic instruction to various youth and adult athletic programs in Brookpark; (b) that he "still engaged in his profession as a pitcher in special "old timer's" games; and (c) that he had been paid "appearance money" as a former baseball star at certain charitable golfing events . . . "

Needham again moved for dismissal pursuant to Fed. R. Civ. P. 12 (B)(6). The same grounds were asserted in the subsequent motion as in the former. On June 25, 1987, in a memorandum opinion, the district court granted the motions of both Needham and Anheuser to dismiss.

Petitioner appealed to the Sixth Circuit. Pursuant to Loc. R. 19 of that court, the court deemed that a written opinion in the case was unnecessary, and simply affirmed the district court's order from the bench. The transcript from the bench reflects the court's reasoning that, as a matter of law, the statement that petitioner had thrown a homerun pitch (when in fact he had not) was not libelous. Accordingly, the court stated that it did not need to reach the issue of special damages.

Additionally, petitioner had attempted at the appellate level to first raise claims of invasion of privacy as well as infliction of emotional distress. The court stated from the bench that, since those actions were not plead in the district court, they were not properly before the court.

2. The question of whether certain language is defamatory is, in the first instance, *a question of law for the Court. Becker v. Toulmin* (1956), 165 Ohio St. 549. In that context, the standard for evaluating a Rule 12 (B)(6) Motion is particularly relevant. Such a motion tests the legal sufficiency of the complaint. See, e.g., *Ott v. Midland-Ross Corp.* (1975), 523 F. 2d 1367. *Where, as in the instant case, the so-called defamatory statements are contained in the complaint, the court is free, as a matter of law, to determine that the statements are not defamatory in the first instance, and, therefore, the complaint fails to state a claim for defamation.*

Indeed, the major thrust of the trial court's memorandum opinion was that the words relied upon to create the cause of action for defamation were not, in the first instance, defamatory at all. As the court stated:

> Petitioner was engaged as a recreation and athletic Director in the fall of 1985 when the publication complained of was made. The only reference in the publication, however was to petitioner's past profession. Since petitioner has not been employed as a major league pitcher since 1962, and since the pubication in no way reflects on petitioner's current profession, the publication cannot be libelous *per se. Moreover, the publication is not of a kind incompatible with the trade or profession of being a major league pitcher, nor does it generally impugn petitioner's pitching ability or connote a general want of professional skills as a pitcher. Hardly a day goes by during the course of the long baseball season when some pitcher somewhere does not deliver a homerun pitch. Homerun pitches are a fact of baseball life that any pitcher must ultimately face.* In the 1960 World Series, no less than 14 homeruns were belted out of Forbes field in Yankee Stadium. Five of these homeruns occurred in the seventh game of the

> Series. This is but one example of the alarming regularity with which hitters "take pitchers downtown."
>
> Whether a publication is libelous or not, is not to be determined from segregated parts of the publication, but from the entire publication, keeping in mind the theme of the composition, the circumstances, and the occasion. . . . Looking at the publication in this context, and interpreting the alleged defamatory statement in the light most favorable to the Petitioner, *this court finds that there is no actionable language.* The motions of Anheuser and Needham to dismiss this cause of action for failure to state a claim are hereby granted. (emphasis added.)

For the reason advanced by the district court, there certainly can be no claim of error with respect to its finding that the words relied upon by the petitioner were not, in the first instance, defamatory at all. Since, as the district court stated, it is not defamatory for a pitcher to be accused of throwing a homerun pitch, for the reason that pitchers routinely throw homerun pitches, there was nothing defamatory *per se* about the publication, neither was there any "innuendo" which would have made the publication defamatory *per quod*. Quite plainly, there was no error in the court's reasoning or determination that the very words relied upon by the petitioner in his complaint did not state a cause of action for defamation.

As a consequence, the Sixth Circuit correctly determined that the district court was free to dismiss the petitioner's claim pursuant to Fed. R. Civ. P. 12 (B)(6). It is the duty of the court, as a matter of law in the first instance, to determine whether the complained-of language constitutes defamation *per se* or *per quod*. *Becker, supra; Matalka v. Lagemann* (1985), 21 Ohio App.3d 134. *Since the court did determine, as a matter of law, that there*

was not defamatory language used, the court necessarily found that the complaint was legally insufficient to state a claim for relief under a theory of defamation. Accordingly, the Sixth Circuit correctly ruled that the 12 (B)(6) motion was appropriately granted by the district court.

3. Because the complained-of language was not defamatory in the first instance, it did not matter whether special damages had been plead properly or not. As co-respondent Needham has correctly pointed out, petitioner failed in both his initial complaint and his amended complaint to properly plead special damages. Nevertheless, it should also be apparent that, since the language that the petitioner complained of was not at all defamatory, it made no difference whether he ever plead special damages appropriately or not.

As stated *supra*, the question of whether the publication or communication was defamatory in the first instance was a question of law for the trial court. Thus, only if the trial court had found that there had been defamatory matter communicated would there have been a need to turn to the second step, and ascertain whether, in addition to the defamatory matter, the petitioner had plead special damages. While the trial court relied heavily on the absence of special damages as the basis for eliminating libel *per quod* as a possible cause of action, it is nevertheless true that the court found that, based upon the character of the publication, "there is no actionable language."

Accordingly, that there were no special damages was but another reason why the complaint failed to state a claim for relief. Nevertheless, from what has just been

stated, even if there had been special damages properly plead, the complaint would still have failed to state a claim. If a claimant properly pleads the damage aspect of the complaint, but fails to properly plead the liability aspect, the complaint fails in any event. That is precisely what happened here. No special damages had been plead, but, even had they been properly plead, they would have been divorced from any cognizable cause of action.

Accordingly, the district court was correct in dismissing the claim of petitioner, and the Sixth Circuit was correct in upholding that dismissal.

4. It was also correct for the Sixth Circuit to reject the extraneous claims of invasion of privacy and intentional infliction of emotional distress, as neither of them were raised at the trial court level. *Seegull Manufacturing Co. v. NLRB* (Sixth Cir. 1984), 741 F. 2d 882. Consequently, neither of these latter claims have been adequately preserved for this court's review.

Accordingly, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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